

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

*Orig - Contains
affidavit of mailing*

75-6076

2/8

To be argued by
PROSPER K. PARKERTON

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-6076

DEC 8 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BAY RIDGE ACTION COMMITTEE, INC., VINCE
FELIX CUCURU, and PAUL LANG,
Plaintiffs-Appellants,

—against—

THOMAS EKELAND, GEORGE ADAMS, HOWARD SMITH, SHORE HILL
DEVELOPMENT FUND CORP., SHORE HILL HOUSING, INC., LU-MED
HOUSING, INC., LUTHERAN MEDICAL CENTER, INC., NEW YORK
CITY DEPARTMENT OF CITY PLANNING and JOHN ZUCCOTTI, as
CHAIRMAN OF THE CITY PLANNING COMMISSION OF THE CITY
OF NEW YORK, THE NEW YORK STATE HOUSING FINANCE
AGENCY and HON. LEE GOODWIN as Commissioner, NEW YORK
STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, S.
WILLIAM GREEN as REGIONAL ADMINISTRATOR, U.S. DEPARTMENT
OF HOUSING & URBAN DEVELOPMENT, and HON. CARLA A. HILLS
as SECRETARY, U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT,

*B
P/S*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR DEFENDANTS-APPELLEES CARLA H. HILLS
and S. WILLIAM GREEN**

DAVID G. TRAGER,
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Docket No. 75-6076

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Plaintiffs-Appellants.

—against—

THOMAS EKELAND, et al.,
Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES CARLA H. HILLS and S. WILLIAM GREEN

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York after a hearing before the Honorable John F. Dooling denying plaintiffs-appellants' motion pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction to enjoin continued construction of the Shore Hill Apartments, located in the Bay Ridge section of Brooklyn, and to enjoin taking any steps in furtherance of continued construction.

On this appeal, the sole issue is whether Judge Dooling's denial of plaintiffs-appellants' application for a preliminary injunction because "it is unlikely in the extreme that plaintiffs will prevail in this case," (App. 170a), was a clear abuse of discretion. Appellants contend that the Department of Housing and Urban Develop-

ment [HUD] failed to proceed correctly under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* [NEPA] and the Clean Air Act § 109 *et seq.*, as amended, 42 U.S.C. 1857C-4 *et seq.* [CAA] and the implementing regulations and guidelines issued under the Acts.

Statement of the Case

The material facts in this case are thoroughly and thoughtfully analyzed in Judge Dooling's memorandum decision denying the preliminary injunction at pages one through twenty-eight. (App. 131a-158a). Therefore, it would be redundant and unnecessary to fully restate those facts here.

However, the court's findings of fact may be summarized as follows. The Shore Hill project to provide housing for elderly persons was developed by a private sponsor to be funded entirely by the New York State Division of Housing and Community Renewal [DHCR] and to be assisted by HUD through mortgage interest reduction payments pursuant to § 236 of the Housing Act of 1937, as amended, 12 U.S.C. 1715(z)-1. The original proposal for a twenty-two story apartment building containing 663 dwelling units was approved by the Project Approval Committee of DHCR and after a public hearing on October 11, 1972, was approved by the Planning Commission of the City of New York. HUD then executed a preliminary reservation of contract authority under § 236. After at least five more public hearings and two reductions in the project, to a sixteen story building with 667 dwelling units and finally to two fourteen story buildings containing 557 dwelling units with a one story community facility, DHCR tendered its final application for § 236 interest subsidy payments to HUD with the applicant's environmental information in accordance with HUD Regulations, 38 F.R. 19,185 and 19,191 in March, 1974.

The HUD Regional Office then prepared a Special Environmental Clearance Worksheet [SECW] (Exhibit "E", Tr. 135-136, located under tab 6 of the Exhibits of defendants Hills and Green) considering the physical environment, the infrastructure, traffic, transportation, energy demand, and with respect to the social environment, the questions of density, recreation, hospital facilities, shopping facilities and aesthetic environment on the basis of on-site inspections, correspondence, telephone conversations and inspection of documents. Upon review and evaluation of the SECW the Environmental Clearance Officer for the New York Region determined that the Shore Hill project had no significant environmental impact and made a finding that the preparation of an Environmental Impact Statement [EIS] was inapplicable.

ARGUMENT

The District Court's denial of plaintiffs-appellants' motion for a preliminary injunction was within its sound exercise of discretion and in accordance with law.

POINT I

HUD's determination that the Shore Hills Project, would not significantly affect the environment is not arbitrary or capricious.

It is well established that NEPA delegates to each agency the authority to make its threshold determination as to whether the preparation of a formal environmental impact statement is necessary.

In *Hanly, et al. v. Mitchell, et al.*, 460 F.2d 640 (2d Cir. 1972), [Hanly I] the Federal defendants conceded that the planned construction of two nine story buildings to provide office space and jail facilities was "major", but

they argued that the impact of the project on the environment was minimal. The court stated at 644:

"We agree with defendants that the two concepts are different and that the responsible federal agency has the authority to make its own threshold determination as to each in deciding whether an impact statement is necessary."

This approval of the negative statement (Finding of Inapplicability), continued to receive support from the Second Circuit in *Hanly, et al. v. Kleindienst, et al.*, 471 F.2d 823 (2d Cir. 1972) [Hanly II]. See also *Echo Park Residents Committee, et al. v. Romney, et al.*, 3 E.R.C. 1255 (C.D. Cal. 1971); *Citizens for Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972); *Maryland National Capitol Park and Planning Comm'n v. U.S. Postal Service*, 4 E.R.C. 1655 (D.C. D.C. 1972); and *Howard v. Environmental Protection Agency*, 4 E.R.C. 1731 (W.D. Va. 1972).

Plaintiffs-appellants seem to contend that an EIS shall in all cases be prepared for projects which are controversial with regard to their environmental impacts, and also to contend that because they represent neighborhood opposition to the project, sufficient controversy exists to require an EIS.

HUD Handbook 1390.1, 38 Fed. Reg. 19185 (1973), considers the existence of *major* controversy raising *substantive* environmental issues as an escalation factor in the type of clearance procedure utilized. In these guidelines, HUD has preserved the option of not preparing an EIS in those cases where it has determined that the project will create no significant impact on the environment and where the cause of controversy stems, not from the type or degree of impact which a project may have, but from a desire to oppose or delay any Federal project on a given site.

The Council on Environmental Quality [CEQ] Guidelines, 40 C.F.R. § 1500 *et seq.*, do state that for proposals likely to be highly controversial with respect to environmental impact, an Environmental Impact Statement should be prepared. However, the type of environmental controversy referred to by the HUD Handbook and by the CEQ Guidelines may be understood as that resulting from a unique use of property or a use the impact of which is difficult to predict, such as the construction of an atomic energy plant. The construction of an apartment complex for the elderly does not fit such a category.

In fact, the Second Circuit found that the word "controversial" need not be equated with neighborhood opposition. *Hanly II*, *supra*, at 630. See also *Citizens For Reid State Park v. Laird*, 336 F. Supp. 783 (D. Me. 1972). The court went on to note in footnote 9A of *Hanly II* at 830:

"To require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge . . . would surrender the determination to opponents of a major federal action, no matter how insignificant its environmental effect when viewed objectively. Experience in local zoning disputes demonstrates that it is the rare case where some neighbors do not oppose a project, no matter how beneficial, and that their opposition is usually accompanied by threats of litigation."

There is ample support and precedent for the agency procedure of finding that a proposal does not constitute a major Federal action significantly affecting the environment and that an EIS is therefore not required pursuant to NEPA.

In considering the scope of judicial review of threshold determination the Court in *Hanly II* held that the ap-

plicable scope of review of an agency's decision that an impact statement is not required under § 102 of NEPA is the "arbitrary, capricious, abuse of discretion" standard. See also *Echo Park Residents Committee v. Romney*, 3 E.R.C. 1255 (C.D. Calif. 1971). Noting that neither Congress nor the CEQ in its guidelines had adequately defined the meaning of "significant effect," the Court stated: "Congress apparently was willing to depend principally upon the agency's good faith determination as to what conduct would be sufficiently serious from an ecological standpoint to require use of the full-scale procedure." *Hanly II*, at 830.

The standard of review was phrased slightly differently by the Fifth Circuit Court of Appeals. In *Hiram Clarke Civic Club, Inc., et al. v. Lynn, et al.*, 476 F.2d 421 (5th Cir. 1973), the Court stated at 425 that only if a plaintiff could show inadequate evidentiary development regarding substantial environmental issues should a court examine the evidence leading to the decision of the agency that the particular project would not significantly affect the environment. In that case, homeowners in an area surrounding the site of a 272-unit apartment complex assisted pursuant to § 236 sought to obtain construction of the project in their semirural neighborhood. After preparation of a Special Clearance Worksheet, HUD issued a negative statement that no EIS would be required. This agency determination was upheld by the Court because a sufficient record had been developed by HUD following its own established procedures.

In *Sierra Club, et al. v. Lynn, et al.*, 7 E.R.C. 1033 (5th Cir. 1974), the same court restated its view at 1036:

"Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then

determine, according to the standards set forth in 101(r) and 102(1) of the Act, whether 'the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.' (citing *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1115 (D.C. Cir. 1971))."

Since the mandatory, operative language of NEPA relates to procedural requirements and does not control the substance of the decisions reached, it can be argued that review under NEPA is limited to determining whether there is compliance with procedural requirements. Applying the Supreme Court's ruling in *Citizens to Preserve Overton Park, et al. v. Volpe, et al.*, 401 U.S. 402 (1971), to the scope of review under NEPA, the Court in *United States v. 247.37, et al.*, 3 E.R.C. 1098 (S.D. Ohio 1971) held at 1105:

"... it is the sole function of the judiciary in this field to require procedural compliance—not to get into the pros and cons of the decision after it has been arrived at procedurally correctly."

This narrow scope of review applies even in the event that there is considerable evidence submitted which disputes the administrator's determination. The District Court for the Northern District of California in *San Francisco Tomorrow v. Romney*, 4 E.R.C. 1065, 1066 (C.D. Cal. 1972), (partially reversed on other grounds, 472 F.2d 1021 (9th Cir. 1973)), stated the following:

"Plaintiffs have supplied the Court with affidavits from geologists, engineers, city planners and the like asserting the unfeasibility of the two projects involved. Nothing in NEPA even suggests that these are the proper concern of this Court or bear in the slightest upon the issues here to be decided."

See also *National Helium v. Borton*, 3 E.R.C. at 1133 (10th Cir. 1971); *Conservation Council v. Froehlke*, 3 E.R.C. 1687, 1689 (M.D. N.C. 1972); *Texas Committee on Natural Resources v. United States*, 1 E.R.C. 1303, 1304 (W.D. Texas 1970); *Environmental Defense Fund, Inc. v. U. S. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972).

The decision of local HUD officials that the Shore Hill project would have no significant impact on the environment was made in accordance with valid regulations, after consideration of all relevant factors, and it does not constitute arbitrary or capricious agency action.

The plaintiffs-appellants broad assertions that HUD's threshold determination failed to consider other relevant factors and is therefore arbitrary and capricious is simply not supported by the record in this case. The SECW which is Exhibit E states, "An analysis has been made of the 'Data Report, Aerometric Network, 1972, New York City Department of Resources' in relation to the evaluation of air quality and the Shore Hill project. There is no significant environmental impact related thereto." In considering this assertion Judge Dooling stated:

"It can hardly be suggested seriously that the addition of 517 small dwelling units on 2.7 acres of land overlooking the harbor in a residential neighborhood could detectably increase air pollution in any substantial part of the ambience, . . . To the extent that it is suggested that it was necessary to determine the air pollution levels in Bay Ridge in order to avert any risks that the elderly were being settled in an unhealthy region, the suggestion does not merit consideration." (App. 163a-164a)

Similarly, Exhibit "E" shows that HUD was aware of the modifications to scale down the Shore Hills project and

noted that, "Lower heights [less than fourteen stories] with greater lot coverage would minimize site planning opportunities, reducing amenities and increasing per unit costs to a point where financial feasibility undoubtedly would be jeopardized." At the hearing James Fleming, the area Environmental Clearance Officer, testified that a study conducted by the cost section of HUD had determined that buildings of a lower height would be financially unfeasible for low and moderate income housing. (Tr. 156). Since higher buildings had been rejected after public hearings and lower buildings would not be financially feasible the SECW concluded that the alternatives were to provide or withhold interest reduction subsidy for the project and rejected the latter alternative. By so considering all reasonable and appropriate alternatives HUD complied with the requirements of § 102(2) (D) of NEPA, 42 U.S.C. § 4332(2) (D). *Schicht v. Romney*, 372 F. Supp. 1270, 1273 (E.D. Mo. 1974); *Sierra Club, et al. v. Lynn, et al.*, 502 F.2d 43 (5th Cir.), rehearing denied, 504 F.2d 760 (1974), cert. denied, — U.S. —, 95 S.Ct. 2001 (1975). Although the Second Circuit has recently expounded on the necessity to consider alternatives under § 102(2) (D), the Court specifically noted that since the language of the statute

might conceivably encompass an almost limitless range, [the Court] need not define its outer limits since we are satisfied that where (as here) the objectives of a major federal project can be achieved in one of two or more ways that will have differing impacts on the environment, the responsible agent is required to study, develop and describe each alternative for appropriate consideration. *Trinity Episcopal School Corporation et al. v. Harten, et al.*, — F.2d — Docket Nos. 75-7061, 7092, at 5080 (2d Cir. Decided, July 24, 1975).

Noise and fire protection were also considered in the SECW. Although police protection was not specifically

considered in the worksheet Judge Dooling noted, "The suggestion that the opening of 517 modestly sized apartment in the Borough of Brooklyn could put a strain on the City police, fire or sanitation departments is so unsupportable as to call in question the good faith of presenting the point." (App. 1622)

POINT II

HUD's failure to give notice to the proposed major federal action is not procedurally defective under the circumstances.

Although *Hanly II* held that before a threshold determination, the responsible agency must give notice of the proposed major federal action to the public and provide an opportunity to submit relevant facts, the Court went on to state:

"The necessity for a hearing will depend greatly upon the circumstances surrounding the particular proposed action and upon the likelihood that a hearing will be more effective than other methods in developing relevant information and an understanding of the proposed action. The precise procedural steps to be adopted are better left to the agency, which should be in a better position than the court to determine whether solution of the problems faced with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data." *Hanly II* at 836.

The circumstances here were that a State funded project would be provided with interest reduction payments by HUD. The local governmental units held at least five public hearings during which the project went through a succession of changes. Before HUD made its

threshold decision it had the benefit of knowing the complaints and recommendations presented by members of the public who attended the meetings. Thus, the requisite notice to the public and opportunity to submit relevant facts were provided under circumstances surrounding the Shore Hills Project.

POINT III

HUD did not violate any provisions of the Clean Air Act.

Plaintiffs-appellants correctly state the prospective standards for carbon monoxide which have been promulgated by the Environmental Protection Agency to be effective by January 1, 1977, and then blandly assert that the Shore Hill defendants will violate the substantive air quality standards without any support in the record for the assertion. They then cite regulations which would be applicable only if an EIS were required under § 102(2) (C) of NEPA. Since HUD has made a valid threshold determination that an EIS is not applicable, neither is the Clean Air Act, *supra*, or the regulations promulgated under it.

POINT IV

In preparing a SECW HUD need not quantify absolute adverse environmental effect or independently obtain data.

The assertion that HUD must obtain absolute data that could be used in determining incremental and cumulative harm where HUD has determined that there is no adverse environmental impact is without merit. Similarly the assertion that HUD must conduct independent research and obtain independent data in preparing a SECW

misconstrues the problem spotting nature of a SECW. Admitted HUD has a responsibility to independently evaluate the data, which it did through on site inspections, correspondence, telephone communication and inspection of documents.

CONCLUSION

The order of the District Court denying plaintiffs-appellants' motion for a preliminary injunction was within its sound exercise of discretion and in accordance with law and should be affirmed in all respects.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON_____, being duly sworn, says that on the 8th_____
day of December, 1975_____, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, ~~xx~~ two copies of the BRIEF FOR DEFENDANTS-APPELLEES
CARLA H. HILLS and S. WILLIAM GREEN
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

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Joseph M. Suszillo, Esq.
437 Bay Ridge Parkway, Brooklyn, New York
Sworn to before me this

11209

8th day of December, 1975

Martha Scharf

Carolyn N. Johnson

CAROLYN N. JOHNSON

MARTHA SCHARF
Notary Public, State of New York
No. 24-345790
Qualified in Kings County
Commission Expires March 30, 1977